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PLANNING DEPT.

CITY OF EDMONDS

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DEVELOPMENT SERVICES DEPARTMENT • PLANNING DIVISION

BEFORE THE HEARING EXAMINER FOR THE CITY OF EDMONDS

Phil Olbrechts, Hearing Examiner

RE: Willowdale Fence Height
Variance

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION

PLN20130039

INTRODUCTION

The applicant requests a variance to a fence height ordinance in order to retain an existing fence that exceeds applicable fence height requirements by two feet. The variance request is denied.

ECDC 17.30.000(D) limits fence height on top of retaining walls to four feet. The fence at issue extends six feet above a three to four foot retaining wall that separates four townhomes from adjoining single-family residences. The illegal fence was constructed by the developer of the townhome property and the current owners of the townhomes were not aware of the code violation when they purchased the property. One of the townhome residents testified she would not have purchased the townhome had she known the fence was limited to four feet. Washington Federal, the applicant, is a bank that came into ownership of one of the townhomes upon foreclosure.

This was a difficult decision to make. There would be no immediate harm to anyone if the variance were approved. As testified by the townhome owners, denial results in loss of privacy, as the townhome owners will be able to look directly into the windows of adjoining single-family homes. However, special circumstances related to the property are required for a variance. The only special circumstance that the applicant can reference is an "innocent purchaser" defense, based upon the fact that

1 the current owners were unaware of the code violation created by the prior owner of
2 the property. Unfortunately for the applicant, ECDC 20.85.010(A)(1)(b) expressly
3 states that special circumstances shall not result from the action of a past owner of the
4 same property. This language is unique in that most local variance ordinances are not
5 as explicit on this issue, evidencing a strong City Council intent to not allow the
6 actions of past owners to justify a variance. The language directly applies to this
7 situation and the Examiner cannot¹ circumvent this clear and unambiguous
8 requirement.

9 TESTIMONY

10 Mike Clugston, Associate Planner, stated that the request is to exceed the allowable
11 maximum retaining wall height on the subject site. ECDC 17.30.000d allows for a
12 post fence to be up to 4' above the top of a retaining wall. The applicant, Washington
13 Federal, is requesting a 6' fence. The 17-unit townhome project has been going on for
14 a number of years. The Architectural Design Board approved the project in 2008, but
15 only the western most building was constructed. The building permits for the three
16 other buildings expired. In 2011, a final inspection from the planning division found
17 an 8' foot fence along the eastern property line along with a retaining wall along the
18 western property line. The fence and wall were not approved by the Architectural
19 Design Board in 2008, thus it was required that these features needed to be removed or
20 made to comply with the code. These walls/fences had been constructed by the
21 previous owner of the property. In April 2013, Washington Federal, the new property
22 owner, applied for a compliant fence and wall on the west property. Now,
23 Washington Federal is applying for a variance for the approved fence; however, this
24 fence does not meet the criteria for a variance. ECDC 20.85 defines six criteria to
25 receive a variance. There must be a special circumstance, special privilege,
consistency with the comprehensive plan, consistency with the zoning ordinance, no
detriment to public health, safety, and welfare, and minimum variance necessary
planned.

In regard to special circumstance, according to Mr. Clugston, there are no
environmental constraints on the property. Washington Federal just needs to remove
two feet of the fence to make it compliant with code. In regard to special privilege,
the surrounding sites are similarly developed with walls of comparable sizes. In
regard to the comprehensive plan, the general design policy of C.2C.II states that
“plans should be designed to preserve the natural features of the site rather than
forcing the site to meet the needs of the imposed plan.” The original developer of the
site decided to grade flat the western part of the site and install the existing retaining

¹ On appeal, the Edmonds City Council might be in a better position than the examiner to create an
“innocent purchaser” exception to the ordinance it has adopted. The examiner will, of course, follow

1 wall and fence. In regard to the zoning ordinance, if the top 2' of the wood fence are
2 removed, the wall/fence would be compliant with the ordinance. In regard to
3 detriments to the public, the wall/fence is not significantly detrimental to the health,
4 safety, and welfare of the people. In regard to minimum variance, again, the wall
5 could be shortened by 2' to meet city code. Staff recommends denial of the variance
6 request because it fails to meet the six criteria listed in ECDC 20.85. In regard to
western neighbor grade/views, these residents will see a 3'-4' retaining wall with a 6'
fence on top of it. The grade of these surrounding neighbors' properties is below the
retaining wall.

7 Applicant Testimony

8 Tom Barghausen, Barghausen Consulting Engineers Inc., testified that the retaining
9 wall running around the west of the property varies in height from 2'-4'. If the wood
10 fence on top was cut back from 6' to 4', the residents of the subject site will look
11 down into the properties of the western neighbors. The project was inherited by
12 Washington Federal in 2012, after the fence/wall was built. Washington Federal
13 removed the fence along the eastern property line. In April, 2013, they applied to cut
14 the existing fence along the western property line, and the application was approved.
15 However, when Washington Federal notified the residents living in the existing
16 building of the plans to reduce the fence height, the residents complained that their
17 privacy would be reduced. This variance qualifies as a special circumstance because
18 Washington Federal and the residents were innocent purchasers. The fence was
19 installed before the residents bought their properties. The code does not limit special
20 circumstances to environmental concerns. In regard to special privilege, similar fence
21 heights exist at the surrounding properties. In regard to the comprehensive plan, this
case is not applicable to the comprehensive plan as it is not specifically discussed. In
regard to the zoning ordinance, if the variance is approved, then the fence complies
with the zoning ordinance. In regard to the public, the project is not detrimental to
health, safety, or welfare. Additionally, not granting the variance is detrimental to the
current townhome owners. In regard to minimum variance, there is no minimum or
middle ground for this situation. Certificates of occupancy (CO) were issued after the
fence was built. The site was inspected by the City before the COs.

22 Public Testimony

23 Stephanie Jones stated she lives in one of the units on the subject site. She was
24 unaware the fence did not meet city code standards. If the fence is cut to 4', she
25 would be looking directly into her neighbor's windows. This is a major privacy issue
for both homeowners. In addition, it will be difficult to ever sell the unit without the

any precedent set by the Council on this issue.

1 higher fence because new buyers will want privacy. The fence is not hurting anyone
2 and helps keep property values high. There are over ten fences on retaining walls in
Edmonds that are higher than 4'.

3 Kim Prime stated she also lives in one of the units on the subject site. She spoke with
4 the property owners to the west of the subject site. According to Ms. Prieo, these
homeowners also wish to keep the fence at its current height. The fence has no affect
5 on anyone but the seven homeowners surrounding it. Additionally, the fence matches
6 the heights of the fences that surround it.

7 Alvin Rutledge testified that it is unclear if Washington Federal has had other
8 problems with properties they own in the area. The applicants claimed to be unaware
of the problems on the property before obtaining it.

9 Staff Rebuttal

10 Mike Clugston noted that the code limits the height of the fence, and these standards
11 must be met by property owners whether they are responsible for building the fence or
not. The situation does not meet the variance criteria.

12 Applicant Rebuttal

13 Tom Barghausen referenced the innocent purchaser affidavit, noting that, in this case,
14 the current townhome owners must be protected. The City issued occupancy permits
15 for the property when the first building was constructed. This case meets the special
16 circumstance provision of ECDC 20.85 because of the innocence of Washington
17 Federal and the townhome owners. The code provides overall guidance, but it does
not cover every possible circumstance.

18 Stephanie Jones added that she would not have purchased her unit if the fence had
19 only been 4' because privacy is very important to her.

20 EXHIBITS

21 All eight attachments listed on page 8 of the staff report were admitted into evidence
22 as Exhibits 1-8, in addition to the staff report.

23 FINDINGS OF FACT

24 Procedural:

- 25 1. Applicant. The applicant is Washington Federal.
2. Hearing. A hearing was held at 3:00 pm on July 25, 2013 at the Edmonds
City Council meeting chambers.

1 **Substantive:**

2 3. Site/Proposal Description. The applicant requests a variance to a fence
3 height ordinance in order to retain an existing fence that exceeds applicable fence
4 height requirements by two feet.

5 ECDC 17.30.000(D) limits fence height to four feet for fences constructed on top of
6 retaining walls that are over three feet in height. The fence at issue extends six feet
7 above a three to four foot retaining wall that separates four townhomes from
8 adjoining single-family residences. The illegal fence was constructed by the
9 developer of the townhome property and the current owners of the townhomes were
10 not aware of the code violation when they purchased the property. One of the
11 townhome residents testified she would not have purchased the townhome had she
12 known the fence was limited to four feet. Washington Federal, the applicant, is a
13 bank that came into ownership of one of the townhomes upon foreclosure.

14 The subject property is located at 20734 7th Ave. W. The fence and retaining wall at
15 issue is located along the west property line. A building containing four townhomes
16 is located on the subject property along the west property line and a single family
17 residence is located on the property adjoining to the west. Properties to the north and
18 south have "similar" (according to the staff report and application) fences of the same
19 height as the fence subject to the variance application. The fence subject to the
20 variance request will be two feet lower than the adjoining fences if it is required to be
21 brought into conformance.

22 4. Characteristics of the Area. The site is adjacent to 76th Avenue West, a
23 minor arterial. To the north, south and southeast are similar multi-family zoned and
24 developed parcels. To the west is a large area of single-family zoned and developed
25 parcels. To the northeast is the City of Lynnwood and College Place Middle and
Elementary schools as depicted in Ex. 2.

5. Adverse Impacts. There are no immediate adverse impacts associated
with the proposal. Immediate impacts are more negative than positive. As testified
by one of the townhome owners, denial of the variance will result in a reduction in
privacy because they townhome owners will then be looking directly into the
windows of the adjoining single-family homes. The townhomes are at least two
stories high and they are situated on a grade that appears to be up to four feet higher
than the adjoining single-family residences. However, the aerial photograph,
Ex. 2, shows the presence of trees that can serve as an aesthetic buffer. Further, there
is room on both the subject property and the adjoining single-family property to add
additional trees. As further shown in the aerial photograph, the single-family homes
are separated by their rear yards from the townhomes, which reduces the privacy
impact. Denial of the variance will also result in modest adverse aesthetic impacts by
resulting in a fence that is two feet lower than the fences that adjoin it to the south and
west.

1 Although there are no immediate adverse impacts, cumulative and long term impacts
2 are an issue. There is nothing unique about the property to justify the variance.
3 Approval of the variance can serve as a limited precedent for similar situations
4 throughout the city, resulting in a series of tall retaining wall/fence structures that
5 ECDC 17.30.000(D) was designed to prevent.

6 CONCLUSIONS OF LAW

7 **Procedural:**

8 1. Authority of Hearing Examiner. ECDC 20.85.020 provides the Hearing
9 Examiner with the authority to review and act upon variance applications as Type III-
10 A.

11 **Substantive:**

12 2. Zoning Designations. The subject property is zoned Multiple-Family
13 Residential (RM 2.4).

14 3. Review Criteria and Application. Variance criteria are set by ECDC
15 20.85.010, quoted below and applied through corresponding conclusions of law.

16 **ECDC 20.85.010:** *No variance may be approved unless all of the findings in this*
17 *section can be made.*

18 **ECDC 20.85.010.A(1) – Special Circumstances:** *That, because of special*
19 *circumstances relating to the property, the strict enforcement of the zoning ordinance*
20 *would deprive the owner of use rights and privileges permitted to other properties in*
21 *the vicinity with the same zoning.*

- 22 a. *Special circumstances include the size, shape, topography, location or*
23 *surroundings of the property, public necessity as of public structures and*
24 *uses as set forth in ECDC [17.00.030](#) and environmental factors such as*
25 *vegetation, streams, ponds and wildlife habitats.*
- 26 b. *Special circumstances should not be predicated upon any factor personal*
27 *to the owner such as age or disability, extra expense which may be*
28 *necessary to comply with the zoning ordinance, the ability to secure a*
29 *scenic view, the ability to make more profitable use of the property, nor any*
30 *factor resulting from the action of the owner or any past owner of the same*
31 *property;*

32 4. The criterion is not met because there are no special circumstances related
33 to the proposal.

1 The applicant advocates an “innocent purchaser” special circumstance, based upon
2 the fact that the applicant and other townhome owners purchased the property without
3 knowing that the fence was built in violation of City code. Unfortunately, ECDC
4 20.85.010(A)(1)(b), quoted above, specifically states that special circumstances
5 should not be predicated upon “*any factor resulting from the action of the owner or*
6 *any past owner of the same property*”. This language is not required by state statute²
7 and is fairly unique to the Edmonds City Code. The City Council’s adoption of this
8 language, in particular to the “past owner” term, evidences a strong legislative intent
9 against adopting any type of “innocent purchaser” exception to the variance criteria.
10 The examiner cannot manufacture an exception to this clear and unambiguous
11 language adopted by the City Council.

8 The property owners also testified that without if the fence is reduced to four feet they
9 would be looking directly into the windows of adjoining residences. Part of this loss
10 of privacy is due to the grade separation between the properties, but this is a minor
11 change in grade and could not be considered a “special” circumstance, given that a
12 grade separation would almost always exist for situations involving a fence on top of
13 a retaining wall.

12 **ECDC 20.85.010(B) – Special Privilege:** *That the approval of the variance would*
13 *not be a grant of special privilege to the property in comparison with the limitations*
14 *upon other properties in the vicinity with the same zoning;*

14 5. The applicant and staff report conclude that granting the variance would
15 not grant in any special privilege because adjoining properties have similar fences.
16 The staff report notes that the adjoining fences are probably nonconforming
17 structures. The courts have concluded that the presence of nonconforming structures
18 does not justify a finding of compliance with the special privilege variance criterion.
19 *See St. Clair v. Skagit County*, 43 Wash.App. 122 (1986). The record does not
20 contain sufficient information to establish compliance with the criterion above.

19 **ECDC 20.85.010(C) – Comprehensive Plan:** *That the approval of the variance will*
20 *be consistent with the comprehensive plan;*

21 6. The criterion is met. The staff report notes that the variance is not consistent with
22 the comprehensive plan because it violates General Design Policy C.2.c.ii, which
23 provides that site plans should be designed to preserve natural features of the site.
24 Staff believes this policy has not been met because the grading work, which
25 necessitated the retaining wall, does not preserve the natural topography of the site.
However, the primary issue of concern is not whether the property should have been
graded, but whether the fence on top of the retaining wall should be four feet high as

² RCW 35A.63.120 does require that a variance be based upon special circumstances related to the property. The Edmonds City Council took the extra step to require that special circumstances could not be predicated upon the actions of past owners.

1 opposed to six feet high. In this regard the most pertinent comprehensive plan policy
2 is Residential Development compatibility policy C.2.b.i., which provides that RM
3 developments should preserve the privacy and view of surrounding buildings. The
4 increase in height sought by the applicant will enhance privacy, which furthers
compliance with the comprehensive plan. There are no other comprehensive plan
policies that are directly implicated by the proposal. Overall, the proposal is
consistent with the comprehensive plan.

5 **ECDC 20.85.010(D) – Zoning Ordinance:** *That the approval of the variance will be*
6 *consistent with the purposes of the zoning ordinance and the zone district in which*
7 *the property is located;*

8 7. Other than the proposed fence height regulation subject to the rezone,
ECDC 20.85.010(A)(1)(b), the proposed variance is consistent with the zoning code.

9 **ECDC 20.85.010(E) – Not Detrimental:** *That the variance as approved or*
10 *conditionally approved will not be significantly detrimental to the public health,*
11 *safety and welfare, or injurious to the property or improvements in the vicinity and*
same zone;

12 8. As determined in Finding of Fact No. 5, there are no significant adverse
13 impacts associated with the proposal and it would enhance privacy and aesthetic
compatibility with surrounding uses. Consequently the criterion is met.


14 **ECDC 20.85.010(F) – Minimum Variance:** *That the approved variance is the*
15 *minimum necessary to allow the owner the rights enjoyed by other properties in the*
16 *vicinity with the same zoning.*

17 9. Denial of the variance would reduce some privacy, but it is debatable
18 whether the loss of privacy would be substantial enough for a finding that this would
19 deprive the townhome owner of rights enjoyed by other properties in the vicinity with
the same zoning.

20 DECISION

21 The variance is denied because there are no special circumstances that necessitate the
22 variance as required by ECDC 20.85.010(A)(1)(b).

23 Dated this 8th day of August, 2013.

24 

25 Phil A. Olbrechts
Edmonds Hearing Examiner

Appeal Right and Valuation Notices

This land use decision is final and subject to closed record appeal to the City Council as authorized by ECDC 20.01.003. Appeals must be filed within 14 days of the issuance of this decision as required by ECDC 20.07.004(B). Reconsideration may be requested within 10 calendar days of issuance of this decision as required by ECDC 20.06.010.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.

DECLARATION OF MAILING

Variance – Washington Federal

PLN20130039

I, Phil Olbrechts, make the following declaration:

1. I am a resident of the State of Washington, over the age of 18 years, not a party to this action, and competent to be a witness herein.

2. On the 8th day of August, 2013, I deposited in the mail, via First Class U.S. Mail, a true and correct copy of the on **FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION** the above captioned matter to the addresses identified in the attached Exhibit A.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Granite Falls, Washington, this 8th day of August, 2013.


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ExA